

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES W. DAVIS, JR.

Claimant

VS.

CITY OF WICHITA

Respondent

Self-Insured

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Docket No. 210,339

ORDER

The application of claimant for review of the Award of Administrative Law Judge Jon L. Frobish dated September 3, 1997, came on before the Appeals Board.

APPEARANCES

Claimant appeared by and through his attorney, Robert R. Lee of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury on January 19, 1996, when an elevator in which he was riding fell two floors. Claimant was stuck in the elevator for approximately one-and-a-half to two hours and phoned the police department from the elevator in order

to request rescue and report the injury. Claimant was referred to Stephen T. Sparks, M.D., board-certified in occupational medicine for treatment. Dr. Sparks treated claimant conservatively diagnosing persistent neck and low-back pain with slightly limited range of motion. He felt claimant had suffered a 7 percent whole body functional impairment with 4 percent of that attributable to the lumbar spine and 3 percent to the cervical spine per the American Medical Association Guides to the Evaluation of Permanent Impairment, Third Edition (Revised) (hereinafter "Guides").

Claimant was referred by the Administrative Law Judge to Philip R. Mills, M.D., board-certified in physical medicine and electro neural diagnoses, for an independent medical examination. Dr. Mills diagnosed a cervical and lumbosacral sprain and assessed claimant a 5 percent functional impairment to the lumbar spine and a 5 percent functional impairment to the cervical spine. He felt there was a 5 percent impairment to the lumbar spine attributable to an earlier workers compensation accident suffered by claimant in 1993 or 1994. However, the record is unclear whether the 5 percent impairment assessed in 1996 is the same 5 percent impairment or in addition to claimant's earlier impairment.

Claimant was referred to Pedro A. Murati, M.D., by his attorney for an independent examination. Dr. Murati, board-certified in rehabilitation and physical medicine, saw claimant on two occasions. He ultimately assessed claimant a 34 percent whole body functional impairment of which 2 percent resulted from the S1 radiculopathy with the remaining 32 percent stemming from claimant's limited range of motion.

The Administrative Law Judge in reviewing the medical evidence found the opinion of Dr. Mills to be the most credible as Dr. Mills did have the opportunity of examining claimant both before and after the accident and was able to make a comparison between claimant's preexisting and current functional impairments. It is significant that Dr. Sparks, the treating physician, also had the opportunity to examine claimant for both injuries and assessed claimant a 7 percent impairment for both the cervical and lumbar spine injuries from the 1996 injury. The Appeals Board finds the opinion of Dr. Sparks to be the most credible. Therefore, the opinion of Dr. Sparks assessing claimant a 7 percent whole body impairment to the cervical and lumbar spine is adopted by the Appeals Board.

The Administrative Law Judge did not mention the medical report of Dr. Murati. However, as the trier of fact it is the function of the Administrative Law Judge and the Appeals Board to decide which testimony is more accurate and/or credible and to adjust the medical testimony as it may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. *Id.* at 785.

The functional impairment rating of Dr. Murati is substantially higher than that provided by Dr. Sparks or Dr. Mills. It is significant that, with the exception of a 2 percent whole body rating for S1 radiculopathy, Dr. Murati's entire 34 percent rating is based upon limited range of motion assessed to claimant's cervical, thoracic, and lumbar spine.

Placed into evidence were three videotapes taken of claimant over a period of several months. In these videotapes claimant is shown cleaning out his garage and snow sledding with his children. The range of motion limitations displayed on the videotape are substantially different than the limitations described by Dr. Murati in his report. Claimant is seen bending over on a regular basis with no apparent limitation, picking up items from the ground without bending his knees, and pulling his children on a snow sled without apparent limitation. As such, the Appeals Board finds the opinion of Dr. Murati, who assessed claimant a 34 percent whole body functional impairment, is based upon an inaccurate history and exaggerated symptoms presented by claimant, and is, therefore, not reliable.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated September 3, 1997, should be, and is hereby, modified and claimant, James W. Davis, Jr., is granted an award against respondent, City of Wichita, a qualified self-insured, for an accidental injury sustained on January 19, 1996, for a 7% permanent partial general disability to claimant's cervical spine.

Claimant is entitled to 2 weeks temporary total disability compensation at the rate of \$326 per week in the amount of \$652 followed by 29.05 weeks permanent partial disability compensation at the rate of \$326 per week in the sum of \$9,470.30 for a total award of \$10,122.30 all of which is due and owing at the time of this award and ordered paid in one lump sum minus amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it is not in contravention to the opinions expressed herein.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director